a

SARIKEI DISTRICT COUNCIL

v.

HAMZAH KIPRAWI & ORS

b

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CRIMINAL APPEAL NO: 20-41-1 OF 1995]
19 NOVEMBER 1996

c ***CRIMINAL PROCEDURE:*** *Appeal - Notice of appeal - Whether must state intention to appeal - Effect of failure to do so - Criminal Procedure Code, s. 307*

d ***CRIMINAL PROCEDURE:*** *Appeal - Petition of appeal - Whether must state substance of judgment appealed against - Whether petition must be properly entitled - Whether defect curable - Criminal Procedure Code, ss. 307(vi), 310*

CRIMINAL PROCEDURE: *Prosecution - Whether all prosecutions must be brought in the name of the Public Prosecutor - Whether only applicable in seizable offences - Criminal Procedure Code, ss. 306, 307(i)*

e ***CRIMINAL PROCEDURE:*** *Appeal - Sanction of Public Prosecutor - Whether a must in all criminal appeals - Criminal Procedure Code, ss. 306, 307(i)*

The respondents were charged in the magistrates court with three offences, pertaining to hawking and littering, under s. 58 of the Local Authority Ordinance, by-law 9 of the Sarikei District Council (Hawking) By-Laws and f by-law 3(1)(d) of the Sarikei District Council (Anti-Litter) By-Laws 1983. The magistrate held that, as the offences were seizable offences, the prosecutions had to be brought in the name of the Public Prosecutor ('PP'). Since the prosecutions were brought in the name of the appellant, they were defective and the charges were dismissed. The appellant appealed.

g In this appeal, the respondents contended, *inter alia,* that: (i) the notice of appeal was bad in law as it failed to express the intention to appeal; (ii) the petition of appeal was also bad in law under s. 307(vi) of the Criminal Procedure Code ('CPC') for failing to state the substance of the judgment appealed against; (iii) the appeal was improperly brought as it was not lodged h by the PP nor was it brought with the written sanction of the PP; and (iv) by virtue of ss. 378 and 379 of the CPC, counsel for the appellant had no right to appear as he was not a public servant but an advocate retained by the appellant and he had not been expressly authorised by the PP to appear.

i

Held:

[1] The omission to expressly state in the body of the notice of appeal that the appellant was desirous of appealing to the High Court against the order of the magistrate was material and therefore rendered the notice of appeal defective and bad in law.

[2] The omission to entitle the grounds of appeal as the 'Petition of Appeal' was not fatal. The contents of the grounds of appeal had complied with the requirements of s. 307(vi) of the CPC and, in any event, the omission was curable under s. 310 of the CPC.

[3] The magistrate had erred in holding that the offences were seizable offences, as it was clear from a reading of the First Schedule to the CPC that all three offences were non-seizable offences. As such, the proceedings could be instituted in the name of the appellant instead of the PP under s. 380(ii)(b) of the CPC.

[4] The written sanction of the PP for the appeal as required under s. 306 of the CPC was not applicable as the respondents were not acquitted by the magistrate. It is provided in s. 307(i) of the CPC that any person who is dissatisfied with any judgment or order pronounced by the magistrates court in a criminal case to which he is a party, may appeal to the High Court. Section 3 of the Interpretation Acts of 1948 and 1967 provides that the word 'person' includes a body of persons corporate or incorporate. Thus, the appellant was entitled to prefer an appeal to the High Court without the sanction of the PP.

[5] Under s. 380(ii)(b) of the CPC, 'any person employed by any local authority' may appear and conduct any prosecution for an offence which is the duty of the authority to enforce. Since the word 'employed' is used and not the word 'employee', the person employed need not have a contract of employment. Consequently, as the counsel for the appellant was employed by the appellant, he could appear and conduct the prosecution on behalf of the local authority.

[6] The PP had not opposed the appeal nor had he wanted to take over the prosecution, therefore counsel for the appellant had a right of audience in the High Court at the hearing of the appeal.

[7] The notice of appeal was bad in law there being no proper appeal before the court, but as the magistrate had erred in law in dismissing the charges against the respondents, it was a proper case for revision under s. 325 of the CPC. The case was ordered to be heard *de novo* before another magistrate.

[Appeal allowed.]

Cases referred to:
Hardial Singh v. Faridah bt Harun & Ors [1988] 2 CLJ 57 ***(foll)***
Masnelan Pakpahon v. PP [1989] 2 CLJ 452 ***(refd)***
Municipal Commissioner, Malacca v. Teh Chwee Swi [1971] 2 MLJ 274 ***(cit)***
PP v. Joehari bin Abdullah [1996] 1 CLJ 100 ***(refd)***
Re Radha Krisna Naidu [1962] MLJ 130 ***(dist)***
Veerasingam v. PP [1958] 24 MLJ 76 ***(refd)***
Yek Tieng Sing & Ors v. PP [1971] 2 MLJ 94 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2(1), 306, 307(1), (6), 310, 325, 377(a), 378, 379, 380(2)(b)
Interpretation Acts 1948 & 1967, s. 3
Local Authority Ordinance, ss. 5, 58
Sarikei District Council (Hawking) By-Laws, by-law 9
Sarikei District Council (Anti-Litter) By-Laws 1983, by-law 3(1)(d)

For the appellant - Dr Chew Peng Hui; M/s Battenberg & Talma Advocs
For the respondents - Chong Siew Chiang; M/s Chong Brothers, Advocs

Reported by Anne Khoo

JUDGMENT

Tee Ah Sing J:

In this appeal the respondents were charged with three charges namely:

(1) For an offence punishable under s. 58 of the Local Authority Ordinance.

(2) For an offence punishable under By-Law 9 of the Sarikei District Council (Hawking) By-Laws.

(3) For an offence punishable under By-Law 3(1)(d) of the Sarikei District Council (Anti-Litter) By-Laws 1983.

On 1 October 1996 when this appeal came up for hearing, Mr. Awang Armadajaya, DPP informed the court that the Public Prosecutor is not a party and therefore will not be making any submissions. The learned DPP also told the court that there is no written permission for Dr. Chew Peng Hui to appear on behalf of the Public Prosecutor.

Dr. Chew Peng Hui, learned counsel for the appellant submitted that there are actually three matters before the court. First, there is the appeal proper. Secondly there is the preliminary objection by the respondents to the appeal. Thirdly there is the application by the appellant made under s. 310 of the

Criminal Procedure Code ('the CPC'). The application under s. 310 of the CPC is only relevant if the preliminary objection is held against him and his application under s. 310 is unsuccessful then he is applying for criminal revision.

The learned counsel for the respondents in his written submission contended that the appellant's notice of motion ought to be dismissed on the following grounds:

(a) The notice of appeal is bad in law. It fails to express in the said notice, the intention to appeal.

(b) The petition of appeal is also bad under s. 307(vi) of the CPC. By the word "shall" in s. 307(vi), it is mandatory to state shortly the substance of the judgment, non-compliance of which, renders the appeal incompetent. In support the case of *Yek Tieng Sing & Ors v. PP* [1971] 2 MLJ 94 was cited.

(c) The affidavit of Kho Pek Choo in support of the motion is inadequate on the strength of the decision in *Masnelan Pakpahon v. PP* [1989] 2 MLJ 362.

(d) The appeal is also improperly brought because s. 306 of the CPC has not been complied with as the appeal was not lodged by the Public Prosecutor nor with the sanction in writing of the Public Prosecutor.

In support the following cases were cited (a) *Re Radha Krisna Naidu* [1962] MLJ 131; (b) *PP v. Joehari bin Abdullah* [1996] 1 CLJ 100; (c) *Hardial Singh v. Faridah bte Haron & Ors* [1988] 2 MLJ 469.

(e) The learned counsel for the appellant submitted that in respect of the notice of appeal there was substantial compliance with s. 307 of the CPC. He also submitted that the heading of the notice of appeal says 'Notice of Appeal' and anyone reading that notice would be quite clear that it is a document intending to appeal against the decision of the lower court. In respect of the petition of appeal it is submitted there was substantial compliance. He also submitted that there was no prejudice to the respondents as it is not a case where the respondents did not know what was before the court in this appeal. He also submitted that the Public Prosecutor has not indicated that they have any objections to the appeal or that they are minded to take over the appeal.

The learned counsel for the appellant urged the court to invoke s. 310 of the CPC so that substantial justice may be done as in *Veerasingam v. PP* [1958] 24 MLJ 76.

In this case there has been merely a dismissal of the charges. This is not an appeal against an acquittal, so s. 306 of the CPC has no operation. It was submitted that the learned Magistrate was wrong in holding that the offences were seizable offences.

It was further submitted that in respect of non-seizable offences the proceedings can be instituted in the name of the Sarikei District Council instead of in the name of the Public Prosecutor. In support the case of *Hardial Singh v. Faridah bt Harun & Ors* [1988] 2 MLJ 465 and *Municipal Commissioner, Malacca v. Teh Chwee Swi* [1971] 2 MLJ 274 were cited.

It was also submitted that in the case counsel appearing for the complainant will not be appearing for the Public Prosecutor and so not within s. 378 of the CPC. In other words s. 378 of the CPC applies only in appeals where the Public Prosecutor is directly involved in the sense that his name is directly used in the institution of the prosecution.

He further submitted that s. 379 only applies to the Federal Government because Government in s. 379 is by the Interpretation Act defined to mean the Federal Government.

The learned counsel for the respondents in reply contended that the head line notice of appeal is merely in form. The most important thing is the contents. When we read the contents, it is neither here nor there. The petition of appeal has not complied with the requirements of the CPC because it failed to give the substance of the judgment appealed.

It was submitted any person employed by the local authority does not include an advocate. The person employed by the local authority means the employee of the local authority who are the full time workers and who are paid from public fund and who are public servant. An advocate engaged or retained by the local authority is not within this class of people.

The notice of appeal reads as follows:

Notice of Appeal

> Take notice that the Sarikei District Council, Sarikei, the complainant in these cases being dissatisfied with the order of the Honourable Magistrate, Encik Awang Krisnada b. Awang Mahmud, made on the 19th day of June, 1995 dismissing the charges against the above accused persons on the ground that the proceedings against them had been a nullity.

Dated this 21st day of June, 1995.

In the body of the notice of appeal it is not expressly stated that the appellant is desirous of appealing to the High Court against the said order.

In other words the appellant has omitted to add in the words "appeals to the High Court against the said order" after the word "nullity". I am of the view that the omission is material and therefore I agree with the contention of the learned counsel for the respondent that the notice of appeal is defective and bad in law.

Paragraph 4 of the affidavit of Kho Pek Choo affirmed on 20 March 1996 reads as follows:

> 4. In typing the petition of appeal in this case, I had inadvertently omitted to type in the heading "Petition of Appeal." I had not followed Form L1 of the Second Schedule in the Criminal Procedure Code because s. 307 of the said Code does not specifically directs that the said form is to be used. I had merely used the format the office has all along been using.

I have the grounds of appeal. It is not entitled "Petition of Appeal". I am of the view that this omission is not fatal. The contents of the grounds of appeal have complied with the requirements of s. 307(vi) of the CPC.

However if I am wrong in this, this omission is curable under s. 310 of the CPC.

Under s. 2(i) of the CPC "non-seizable offence" means an offence for which and "non-seizable case" means a case in which a police officer may not ordinarily arrest without warrant according to the third column of the First Schedule.

The First Schedule under "Offences Against Laws Other Than The Penal Code" reads as follows:

OFFENCES AGAINST LAWS OTHER THAN THE PENAL CODE

If punishable with death, or imprisonment for seven years or upwards	May arrest	Warrant	Not bailable	Not compoundable
If punishable with imprisonment for three years and upwards, but less than seven	do	do	do	do

If punishable with imprisonment for less than three years	Shall not arrest without warrant	Summons	Bailable	do.	
If punishable with fine only ...		do	do	do	do

The punishment for the 1st charge under s. 58 of the Local Authority Ordinance is imprisonment for three months and a fine of five hundred dollars.

It is clear from the 2nd and 3rd columns of the First Schedule to the CPC that the 1st charge is in respect of a non-seizable offence.

The punishment for the 2nd charge under By-Law 9 of the Sarikei District Council (Hawking) By-Law is a fine of two hundred dollars, and, in the case of a continuing offence, an additional fine of ten dollars for every day during which such offence continues.

It is clear from the 2nd and 3rd column of the First Schedule to the CPC that the 2nd charge is in respect of a non-seizable offence.

The punishment for the 3rd charge under By-Law 3(1)(d) of the Sarikei District Council (Anti-Litter) By-Laws 1983 is a fine of five hundred dollars.

It is clear from the 2nd and 3rd columns of the First Schedule to the CPC that the charge is in respect of a non-seizable offence.

Since I am of the view that the three charges are in respect of non-seizable offences, the provisions of s. 377(a) of the CPC are inapplicable as this section is in respect of a seizable offence.

Therefore the learned Magistrate erred when he held that the three charge were of seizable offences.

I agree with the contention of the learned counsel for the appellant that in respect of non-seizable offences the proceedings can be instituted in the name of the Sarikei District Council instead of in the name of the Public Prosecutor.

And I am of the view that the applicable provision in s. 380(ii)(b) of the CPC. The relevant part reads as follows:

> 380. Notwithstanding anything in this chapter contained ...
>
> (i) ...
>
> (ii) In summary non-seizable cases in the court of a Magistrate ...

(a) ...

(b) Any officer of any Government Department or of any local authority or statutory authority or any person employed by any local or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;

(c) ...

So under s. 380(ii)(b) of the CPC what does the words "any person employed by any local authority" mean?

This section uses the words "any person" instead of the words "any advocate" or "any employee". Further the word "employed" is used and not the word "employee". If the word "employee" is used then it refers to a contract of employment. Since the word used is "employed" the meaning given to the words "any person employed" is that this person need not have a contract of employment.

I am of the view that an advocate is a person.

Since the advocate is employed by the Sarikei District Council, then by virtue of s. 380(ii)(b) of the CPC the advocate may appear and conduct the prosecution on behalf of the local authority ie, the Sarikei District Council, for the three offences which is the duty of the Sarikei District Council to enforce.

In p. 36 of the appeal record the learned Magistrate in his ruling said:

> It is a nullity from the beginning and I order all the charges against all the accused persons to be dismissed accordingly.

I shall now deal with s. 306 of the CPC.

Section 306 provides as follow:

> 306. When an accused person has been acquitted by a Magistrate there shall be no appeal except by, or with the sanction in writing of, the Public Prosecutor.

The case of *Re Radha Krisna Naidu* [1962] MLJ 130 cited by the learned counsel for the respondents decided that when when an accused person in acquitted only the Public Prosecutor may appeal but in the present case the respondents were not acquitted in the lower court.

Since the respondents were not acquitted by the learned magistrate s. 306 is not applicable.

The relevant part of s. 307(i) of the CPC reads as follows:

> 307(i) ... any person who is dissatisfied with any judgment, sentence or order pronounce by any Magistrate's court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order ...

Section 5 of the Local Authority Ordinance (Cap 117) provides as follows:

> 5. Every local authority constituted under this Ordinance, other than an individual person shall be a body corporate with perpetual succession and a common seal and may sue and be sued in the corporate name.

Under s. 3 of the Interpretation Acts 1948 and 1967 the word "person" includes a body of persons, corporate or unincorporate.

So it is clear that the Sarikei District Council is a person.

And under s. 307(i) as the Sarikei District Council is dissatisfied with the judgment pronounced by the Magistrate's court in a criminal case to which it is a party it may prefer an appeal to the High Court against such decision. I am of the view that the Sarikei District Council can file this notice of appeal and no sanction of the Public Prosecutor is required.

I can do no better then cite the case of *Hardial Singh v. Faridah bt Haron & Ors* [1988] 2 MLJ 465 at pp. 469 and 470 where his lordship KC Vohrah J said:

> To sum up. What needs to be borne in mind is the distinction between the right of appeal and the right of audience in the High Court. It is clear there is a right of appeal given to a private complainant under s. 307(i) save that he cannot appeal where the defendant prosecutes is acquitted except with the sanction of the Public Prosecutor (see s. 306). It seems to me that if he has a right of appeal, as a corollary, he also has the right of audience in the High Court on the hearing of the appeal otherwise the right of appeal becomes an illusory right if there is no one to represent the appellant in the High Court. But where the Public Prosecutor becomes cognisant of the criminal appeal by the private complainant and he decides to intervene in the appeal (and the Public Prosecutor by s. 376 has the control and direction of all criminal proceedings which include criminal appeals) the Public Prosecutor then becomes directly involved in the appeal and in that case either the Public Prosecutor on his behalf or any of the persons enumerated in s. 378 on behalf of the Public Prosecutor will have the right of audience in the High Court. The Public Prosecutor steps into the shoes of the private complainant *qua* appellant; the Public Prosecutor is the appellant and the private complainant then no longer has the right of audience in the appeal before the High Court.

I am in full agreement with his Lordship KC Vohrah. Since the Sarikei District Council has a right of appeal it also has the right of audience in the High Court on the hearing of the appeal otherwise the right of appeal becomes an illusory right if there is no one to represent the appellant in the High Court.

I am further of the view that in respect of an appeal against the decision of a magistrate pertaining to a non-seizable offence, the notice of appeal can be lodged in the name of the complainant and not in the name of the Public Prosecutor.

Section 378 of the CPC provides as follows:

> 378. No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor or a Deputy Public Prosecutor, or a police officer not below the rank of Inspector or an advocate expressly authorised in writing by the Public Prosecutor or by a Deputy Prosecutor, acting on behalf on behalf of the Public Prosecutor.

Section 378 of the CPC applies where the prosecution of the offences is done in the name of the Public Prosecutor and the appeal therefrom is instituted in the name of the Public Prosecutor.

In the instant case the appeal is lodged by the Sarikei District Council and therefore the learned counsel is appearing on behalf of the Sarikei District Council and not on behalf of the Public Prosecutor. As such s. 378 of the CPC does not apply.

Further as the learned DPP has not indicated that he is opposing the appeal and also taking over the conduct of the appeal, I am of the considered view that the learned counsel for the appellant have a right of audience in the High Court at the hearing of this appeal.

As the notice of appeal is bad in law the no appeal before this court. However as the that the learned magistrate has erred in law in making the said order this is a fit and proper case for revision.

In the exercise of my power of revision under s. 325 of the CPC, I set aside the order of the learned Magistrate. Since the learned magistrate has been transferred I order that the case be heard *de novo* before another magistrate.